

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
<b>LAWRENCE BEHR</b>	)	
Application to Operate a	)	
Phase I 220 MHz License in	)	File No. 983133
Denver, Colorado	)	
	)	
<b>NET RADIO COMMUNICATIONS</b>	)	
<b>GROUP, LLC</b>	)	
Authorization for 220 MHz Station	)	
Call Sign WPFQ335	)	
Denver, Colorado	)	

**ORDER**

**Adopted: September 26, 2002**

**Released: September 30, 2002**

By the Chief, Commercial Wireless Division, Wireless Telecommunications Bureau:

**I. INTRODUCTION**

1. In this order, we correct, on our own motion, an administrative error and reinstate the above-captioned application filed by Lawrence Behr (Behr) for a Phase I 220 MHz license in Denver, Colorado. We also set aside a subsequent conflicting license issued to Net Radio Communications Group, LLC (Net Radio) for site-by-site operation in Denver, and we dismiss a related Application for Review filed by Behr as moot.<sup>1</sup>

**II. BACKGROUND**

2. In April 1991, the Commission established the 220-222 MHz radio service (220 MHz Service) with the adoption of the *220 MHz Report and Order*.<sup>2</sup> The Commission began accepting site-specific Phase I applications for 220 MHz licenses on May 1, 1991.<sup>3</sup> On May 24, 1991, after receiving

---

<sup>1</sup> A 1995 Public Notice indicated that all Non-Nationwide 220 MHz Phase I licenses for which frequencies were available had been granted, and that all other pending Non-Nationwide 220 MHz Phase I applications were dismissed. *See* In the Matter of Disposition of Non-Nationwide 220-222 MHz Applications, Order, 10 FCC Rcd 7747 (1995). On October 25, 1996, Behr sought reconsideration of the dismissal of the above-captioned application. On October 10, 1997, the Licensing and Technical Analysis Branch (LTAB) of the Commercial Wireless Division dismissed Behr's Petition as untimely filed. On November 10, 1997, Behr filed an Application for Review of LTAB's dismissal of Behr's Petition.

<sup>2</sup> Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services, PR Docket No. 89-552, *Report and Order*, 6 FCC Rcd 2356 (1991) (*220 MHz Report and Order*).

<sup>3</sup> *See* FCC Adopts New Rules for Use of 220-222 MHz Band by Private Mobile Licensees, *Public Notice*, Mimeo No. 2186 (March 14, 1991).

over 59,000 applications, the Commission instituted a freeze on the filing of any further initial 220 MHz license applications.<sup>4</sup>

3. On May 1, 1991, Behr submitted his application for a Phase I 220 MHz license in Denver.<sup>5</sup> Because Behr's application was mutually exclusive with other applications, the Land Mobile Branch of the former Private Radio Bureau (Branch) conducted a lottery, in which Behr was selected as a tentative selectee for Denver.<sup>6</sup> On January 28, 1993, the Branch returned Behr's application with a request for additional technical information, and Behr timely resubmitted the corrected application on March 23, 1993.<sup>7</sup> The Branch subsequently misplaced Behr's amendment, and improperly failed to issue Behr a Phase I 220 MHz authorization. On September 6, 1994, the Branch, unaware of Behr's timely refiled application, granted a Phase I 220 MHz license to the second tentative selectee in Denver, Gary Petrucci (Petrucci), under call sign WPFQ335.<sup>8</sup>

4. In 1998, the Commission auctioned numerous 220 MHz Economic Area (EA) geographic licenses in Auction No. 18, including the Denver EA on the same frequencies Behr sought in his Phase I application. Net Radio was the high bidder for the Denver market in Auction 18, and became the geographic area license for this channel block.

### III. DISCUSSION

5. Commission records reflect that Behr timely refiled his amended Phase I 220 MHz application. As the initial tentative selectee in Denver, Behr's application should have been timely processed. We find that the administrative error in misplacing Behr's application resulted in both the improper dismissal of his application and the grant of call sign WPFQ335 to the second tentative selectee in Denver. We will correct this inadvertent ministerial error by reinstating, on our own motion, Behr's referenced application for further processing.

6. It is well settled that an agency has the authority to correct inadvertent ministerial errors, even after the agency has taken final action.<sup>9</sup> The Commission recently addressed this issue and upheld a

---

<sup>4</sup> In the Matter of Acceptance of 220-222 MHz Private Land Mobile Applications, *Order*, 6 FCC Rcd 3333 (1991) (*Freeze Order*). From among those applications filed prior to the freeze, the Commission granted licenses to non-mutually exclusive applicants on a first-come, first-served basis, while mutually exclusive applications were resolved through a lottery. In 1997, Congress terminated the Commission's authority to award licenses via random selection in most circumstances and required resolution of mutually exclusive applications via competitive bidding. See 47 U.S.C. § 309 (i) (5) and 47 U.S.C. § 309 (j).

<sup>5</sup> FCC File No. 983133.

<sup>6</sup> See Commission Announces Tentative Selectees for 220-222 MHz Nationwide Commercial Private Land Mobile Channels, *Public Notice*, DA 93-376 (rel. Apr. 1, 1993), 58 Fed. Reg. 26322 (May 3, 1993) (*Lottery Public Notice*).

<sup>7</sup> See Application Return Notice for the Private Land Mobile Radio Services, dated January 28, 1993. See also former rule section 90.141, 47 C.F.R. § 90.141 (1993) (applicant must supply requested information within sixty days of application return notice date in order to retain place in application processing line).

<sup>8</sup> On September 19, 1997, while Behr's Petition remained pending, LTAB approved the assignment of call sign WPFQ335 in Denver from Petrucci to Roamer One (Roamer). On January 13, 2000, while Behr's Application for Review remained pending, LTAB approved the assignment of call sign WPFQ335 from Roamer to the current licensee, Net Radio.

<sup>9</sup> See *American Trucking Ass'n v. Frisco Transportation Co.*, 358 U.S. 133, 145-146 (1958); *Chlorine Institute v. OSHA*, 613 F.2d 120, 123 (5th Cir. 1990). In *American Trucking*, the court acknowledged an agency's ability to

decision of the Policy and Rules Branch of the Commercial Wireless Division to reinstate, on its own motion, a cancelled license, stating that “[t]he Commission, upon learning of an inadvertent ministerial processing error may correct its error, even beyond the reconsideration period.”<sup>10</sup> The Commission has noted, however, that the authority to revisit final actions is limited.<sup>11</sup> In *San Mateo*, the Commission explained that this authority extends only to the correction of clerical or administrative errors that underlie or occur in the process of taking an action.<sup>12</sup> Moreover, as the Court stated in *American Trucking*, “the power to correct inadvertent ministerial errors may not be used as a guise for changing previous decisions because the wisdom of those decisions appears doubtful in the light of changing policies.” We find that the Branch’s inadvertent, ministerial error in misplacing a properly filed application is within our authority to correct, and that to correct this error is not to reverse a prior decision regarding the merits of Behr’s application. Accordingly, we will return Behr’s application to pending status, and will process the application in accordance with the rules in effect at the time the application amendment was filed.

7. We also find that the administrative error concerning the handling of Behr’s amended application directly resulted in the improper issuance of a Phase I authorization to the second tentative selectee in Denver. Had the Branch not misplaced Behr’s amendment, Behr’s application would have been processed first because of Behr’s status as the initial tentative selectee in Denver, and therefore the second tentative selectee’s application would not have been granted. Accordingly, we hereby set aside the improper grant of call sign WPFQ335, currently licensed to Net Radio in Denver.<sup>13</sup>

8. Net Radio, as the geographic licensee for the Denver EA on the relevant channel block, will be required to afford interference protection to Behr’s facility pursuant to our rules, provided Behr timely constructs its facilities.<sup>14</sup> However, to avoid unnecessary disruption of Net Radio’s current service in the Denver market, we grant Net Radio special temporary authority to operate under the parameters of the authorization set aside in this order, call sign WPFQ335. The special temporary authority is granted for the earlier of: 1) 180 days from the date of this order; or 2) until such time as Behr provides Net Radio

---

correct administrative errors, stating that “[t]o hold otherwise would be to say that once an error has been done the agency is powerless to take remedial steps.”

<sup>10</sup> See *In the Matter of Mobile UHF, Inc., Memorandum Opinion and Order*, 16 FCC Rcd 22,945 (2001). In *Mobile UHF*, LTAB cancelled a license for failure to timely construct, erroneously believing that the license was one of a group of licenses that had sought and been denied construction extensions in connection with the “Goodman/Chan” proceeding. After the applicable finality period, Mobile UHF’s license was reinstated after it informed the Commission that it had not sought an extension and provided evidence that the station had been timely constructed.

<sup>11</sup> See *In the Matter of Applications of County of San Mateo, California, Memorandum Opinion and Order*, 16 FCC Rcd 16501 (2001).

<sup>12</sup> *Id.* at 16503 ¶ 8.

<sup>13</sup> We note that Behr’s pending Application for Review, which we dismiss as moot, was included on the Commission’s Due Diligence Public Notice for Auction 18 (including the specific frequencies and market). Net Radio therefore had notice of Behr’s claim to the Denver market when it: 1) bid on and won the 220 MHz auction for the Denver market; and 2) received assignment from Roamer, on January 13, 2000, of the Phase I Denver authorization under call sign WPFQ335.

<sup>14</sup> See 47 C.F.R. § 90.763 (b).

written notification that it is ready to commence operations under an authorization granted pursuant to this order.<sup>15</sup> Finally, because we correct, on our own motion, an administrative error by reinstating Behr's application for further processing and setting aside the grant of call sign WPFQ335, we dismiss Behr's Application for Review as moot.

#### IV. ORDERING CLAUSES

9. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and sections 0.131 and 0.331 of the Commission's rules, 47 C.F.R. §§ 0.131, 0.331, the application filed by Lawrence Behr on May 1, 1991, under File Number 983133 for a Phase I 220 MHz license in Denver, Colorado, IS HEREBY REINSTATED TO PENDING STATUS for further processing by the Licensing and Technical Analysis Branch of the Commercial Wireless Division, consistent with Commission rules and regulations in effect as of March 23, 1993.

10. IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and sections 0.131 and 0.331 of the Commission's rules, 47 C.F.R. §§ 0.131, 0.331, Call Sign WPFQ335, a 220 MHz Phase I station licensed to Net Radio Communications Group LLC in Denver, Colorado, is hereby SET ASIDE.

11. IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154 (i), and section 1.931 of the Commission's rules, 47 C.F.R. § 1.931, Net Radio Communications Group, LLC is granted special temporary authority to continue 220 MHz operations in Denver, Colorado in accordance with paragraph 8 above.

12. IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and section 0.331 of the Commission's rules, 47 C.F.R. § 0.331, the Application for Review filed by Lawrence Behr on November 10, 1997, is hereby DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

William W. Kunze, Chief  
Commercial Wireless Division  
Wireless Telecommunications Bureau

---

<sup>15</sup> In the event Behr's application is granted and he does not timely construct, any authorization granted to Behr would automatically terminate and Net Radio, as the Denver geographic licensee, would have reversionary rights in those frequencies, subject to providing adequate interference protection to other incumbent licensees in the Denver EA. See Commission rule 90.763 (b), 47 C.F.R. § 90.763 (b).